

January 30, 2013

By Electronic Mail, Facsimile, and Federal Express

Mr. Jeff S. Jordan
Federal Election Commission
999 E Street NW
Washington, DC 20463
Fax: (202) 219-3923
E-mail: kcollins@fec.gov

Re: *Response to Complaint Against Hearst Television Inc./WCVB Channel 5*
(MUR 6703)

Dear Mr. Jordan:

We are submitting this letter on behalf of Hearst Stations Inc.,¹ licensee of WCVB-TV ("WCVB" or "Station") in response to the Complaint filed with the Federal Election Commission ("Commission") by Daniel Fishman ("Fishman"), the Libertarian candidate for Congress in Massachusetts' Sixth Congressional District.² Fishman challenges the pre-determined objective criteria that the Station used to select the candidates to participate in a televised debate ("Debate") that occurred on WCVB on October 25, 2012.

For the reasons set forth below, the Complaint should be dismissed and the Commission should take no action against Hearst Stations Inc. or WCVB.

BACKGROUND

WCVB has a long history of broadcasting political debates and public affairs programming. (Declaration of Andrew Vrees ("Vrees Decl.") ¶ 3.) Such programming is an integral part of the Station's newsgathering activities as well as the Station's public interest

¹ Although the Hearst entity designated as the respondent in this matter is "Hearst Television Inc.," the licensee of WCVB-TV is Hearst Stations Inc.

² On January 22, 2012, the undersigned counsel was informed by Kim Collins of the Commission that the response date for this matter was set for January 31, 2013.

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obligations under the Communications Act of 1934 and the rules and regulations of the Federal Communications Commission.

In or around early October 2012, WCVB began making plans to host the Debate during the Station's regularly scheduled public affairs program, "On the Record." (Vrees Decl. ¶¶ 4-5; Declaration of Rosemary Lappin ("Lappin Decl.") ¶ 4.) The Station did not incur any additional costs to "stage" the Debate within this regularly scheduled public affairs program. (Vrees Decl. at ¶ 6.) Rather, the candidates appeared on the program just as they would appear for a bona fide news interview program. (*Id.*)

Before the Station selected any of the candidates for the Debate, WCVB senior producer Rosemary Lappin, in consultation with news director Andrew Vrees, identified the following objective criteria to be used to select the candidates:

- (1) Campaign staff of at least three;
- (2) Daily campaign schedule;
- (3) Regular communication with news media;
- (4) Campaign contributions of at least \$50,000; and
- (5) Showing of at least 10% in two of the latest independent polls.

(Lappin Decl. ¶ 5.) The Station drew these criteria from substantially similar written criteria that the Station had previously used in candidate debates, including a 2010 gubernatorial debate sponsored by the Boston Media Consortium, of which WCVB is a member, and a 2010 Senatorial debate sponsored by the Station. (Vrees Decl. ¶¶ 7-8.)

On October 11, 2012, Ms. Lappin sent an e-mail to each of the three candidates, in advance of the Debate, to announce the Debate and to notify the candidates of the objective criteria that each candidate must satisfy in order to participate. (Lappin Decl. ¶ 6.)

Fishman received and responded to Ms. Lappin's e-mail. (*Id.* ¶ 7.) Although Fishman inaccurately complained that WCVB was "deliberately not inviting a campaign that is gaining traction every day," Ms. Lappin assured Fishman that "if you meet [] all [of the criteria] by Monday, October 22, you will be included." (*Id.*, Ex. A.)

Ms. Lappin ultimately concluded that Fishman failed to meet each of the criteria. Specifically, she found that Fishman garnered just 2% and 6% support in two recent polls conducted by the *Boston Globe* and WBUR, respectively. (*Id.* ¶ 9.) Although Fishman's poor showing in the polls was by itself sufficient to warrant exclusion from the Debate, Ms. Lappin also concluded that Fishman did not raise a sufficient amount of campaign funds, did not have a daily campaign schedule, and did not have regular communication with the news media. (*Id.*)

On October 22, 2012, Ms. Lappin notified Fishman that his campaign did not meet the pre-determined objective criteria for inclusion in the Debate. (*Id.* ¶ 11.)

DISCUSSION

Corporations are prohibited by federal law from making any contribution to any candidate in connection with a Federal election.³ Contributions include any "expenditures" by a corporation that are made in coordination with a candidate.⁴ The term "expenditure" does not, however, include activities that fall within the station's legitimate press function or within the Commission's regulations governing the staging of candidate debates. The Debate falls easily within both of these independent exceptions to the definition of "expenditure."

A. The Debate Fell Within The Media Exemption

Although many media entities are corporations, the Commission's ability to regulate and investigate media activities is restricted by the so-called "media" or "press" exemption found in 2 U.S.C. § 431(9)(B)(i).

The media exemption excludes the cost of any "news story, commentary, or editorial distributed through the facilities of any broadcasting station" from the definition of contribution or expenditure.⁵ A federal district court held in *Readers Digest Association, Inc. v. FEC* that the Commission was barred from investigating the activities of a media organization unless and until the press exemption is determined to be inapplicable:

[F]reedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the press exemption.⁶

³ 2 U.S.C. § 441b.

⁴ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 908, 175 L. Ed. 2d 753, 793 (2010).

⁵ See 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

⁶ 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981).

The media exemption applies where (1) the entity is not owned or operated by a political party, candidate, or political committee, and (2) the entity is operating within its "legitimate press function."⁷

Both prongs are met here. WCVB is owned by Hearst Stations Inc. and is not owned or controlled by a political party, political committee, or candidate.⁸ The Station's broadcasting of a candidate debate within a regularly scheduled news and public affairs program is clearly a "news story" within the meaning of the media exemption because both "On the Record" and the Debate contained within that program were integral components of WCVB's newsgathering activities designed to inform viewers of the issues and candidates for Massachusetts' Sixth Congressional District.⁹ The Debate also easily satisfies the Commission's rules applying the media exemption to a "bona fide news account" that is "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates."¹⁰ As a result, the Station's Debate is exempt from the definition of "contribution or expenditure" under the media exemption.

This result is consistent with the special rules and regulations governing television licensees established by the FCC. The FCC encourages television stations to present debates and other political and public affairs programming as part of its public interest stewardship. The FCC has its own political broadcasting rules that govern debates and other bona fide news programming, and the FCC allows stations to exempt qualifying debates and other news programming from the FCC's "equal opportunities" requirement.¹¹ In addition, it is well-settled that there is no private right of action under Section 315 of the Communications Act by a candidate who has been excluded from a debate broadcast by a television station (whether public or private).¹²

⁷ See *id.*; accord 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

⁸ See Vrees Decl. ¶ 2.

⁹ See MUR 5224 (Boston Globe) (a "news organization's presentation of a candidate debate is a 'news story' within the meaning of this provisions of the FECA") (Statement of Reasons by Chairman Mason, Vice-Chairman Sandstrom, and Commissioners Smith and Toner); see also MUR 5110, 5162.

¹⁰ See 11 C.F.R. §§ 100.73, 100.132.

¹¹ Although Section 315(a) of the Communications Act requires that television licensees provide equal opportunities for all legally qualified candidates to use its broadcast facilities, debates are excluded from that rule as "bona fide news interviews" or "on-the-spot coverage of bona fide news events." 47 U.S.C. § 315(a)(2), (4); see *In re Henry Geller*, 95 F.C.C.2d 1236.

¹² See, e.g., *McCarthy v. Nat'l Broad. Co.*, No. 96-7822, 1998 U.S. App. Leds 2874, at *9 (2d Cir. Feb. 24, 1998) (unpublished); *Lechtner v. Brownyard*, 679 F.2d 322, 326-27 (3rd Cir. 1982); *Belluso v. Turner Commc'ns Corp.*, 633 F.2d 393, 397, 401 (5th Cir. 1980); *Daly v.*

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Most importantly, application of the media exemption for selection of debate participants is fully consistent with the Supreme Court's recognition that a broadcaster's exercise of journalistic discretion is protected by the First Amendment, and that protection includes the right to exclude candidates from debates based upon reasonable, viewpoint-neutral news judgments.¹³ The D.C. Circuit has expressly recognized the "importance of preserving a large measure of journalistic discretion for broadcasters, as a serious First Amendment issue" in holding that neither the Communications Act nor the First Amendment supported a candidate's demand to be included in a debate.¹⁴ These constitutional principles support the Commission's media exemption and serve to guard against governmental interference with a television station's good-faith news judgments made in the course of sponsoring and broadcasting candidate debates.

For all of these reasons, the Station's broadcast of the Debate was permitted by the FEC's media exemption, the FCC's political broadcasting regulations, and by the Station's constitutionally protected exercise of reasonable journalistic discretion.

B. The Debate At Issue Fell Within The Debate Exemption

The costs of staging a debate are also exempt from the prohibition on corporate contributions or expenditures under a separate exemption—compliance with the Commission's debate regulations under 11 C.F.R. § 110.13. Here, the Station did not incur additional costs for "staging" the Debate because the candidates merely appeared on the Station's regularly scheduled weekly public affairs program (Vrees Decl. ¶ 6), but the Station nevertheless fully complied with the Commission's debate regulations.

Section 110.13 expressly permits broadcasters to stage debates, provided that (1) the broadcaster is not owned or controlled by a political party, political committee, or candidate, (2) the debates include at least two candidates, and (3) the debate is not structured to promote or advance one candidate over another.¹⁵ The Commission's rules further require that the station

Columbia Broad. Sys., Inc., 309 F.2d 83, 85 (7th Cir. 1962); *Palmer v. Fox Broad. Corp.*, No. CIV.A.02-0108, 2002 U.S. Dist. Lexis 20301, at *3-4 (E.D. La. Jan. 15, 2002); *Arons v. Donovan*, 882 F. Supp. 379, 385 (D.N.J. 1995); *Lamb v. Griffin Television, Inc.*, 804 F. Supp. 1430, 1431 (W.D. Okla. 1992).

¹³ See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 683 (1998).

¹⁴ *Johnson v. FCC*, 829 F.2d 157, 163-64 (D.C. Cir. 1987); see *Amsterdam v. KITV 4 TV Station*, No. 10-00253 DAE-KSC, 2010 U.S. Dist. LEXIS 91021, at *21-25 (D. Haw. Aug. 31, 2010) (applying *Forbes* to uphold station's journalistic discretion in selecting debate participants); *Smith v. Greater San Antonio Chamber of Commerce*, No. SA-05-CA-0308-XR, 2005 U.S. Dist. LEXIS 6416, at *3-5 (W.D. Tex. Apr. 15, 2005) (same).

¹⁵ See 11 C.F.R. § 110.13; see also 11 C.F.R. §§ 100.92 (debates that comply with 11 C.F.R. § 110.13 are exempt from definition of "contribution"); 100.154 (same for "expenditure").

use "pre-established objective criteria to determine which candidates may participate in a debate."¹⁶

1. The Debate Criteria Were Pre-Established *and* Objective

As detailed in the Declarations of Rosemary Lappin and Andrew Vrees, the Station developed written objective criteria prior to the Debate, notified the candidates of the criteria prior to the Debate, and applied the criteria to determine which candidates qualified for the Debate. (Lappin Decl. ¶¶ 4-5; Vrees Decl. ¶¶ 7-8.)

The Commission affords media entities wide latitude in developing objective criteria, noting that "the choice of which objective criteria to use is largely left to the discretion of the staging organizations."¹⁷ Here, the Debate criteria pre-established by the Station were objective benchmarks designed to assure that the public had a chance to hear from, and consider, the candidates whose campaigns had generated sufficient support and interest from the voting public and the news media. The objective criteria were based on historical written criteria previously used by the Station in two debates during 2010. (Vrees Decl. ¶¶ 7-8.)

The use of independent polling data is an empirical measuring stick of voter support that has been approved as a reasonable objective criterion for inclusion in debates.¹⁸ The campaign contribution requirement is another modest benchmark that reflects the campaign's ability to attract a threshold level of support from a variety of individuals and an ability to finance the basic operations of a campaign. The criteria of regular communication with the media, a campaign staff of three, and a daily campaign schedule helps identify campaigns that are generating a regular pattern of events, activities, or support that is of interest to voters and news organizations.

There is no dispute that Fishman failed to meet each of the five criteria. Fishman does not argue that he had a campaign staff of three persons or that he had a daily campaign schedule. He also readily admits that he did not raise \$50,000 in contributions, and his FEC records for 2012 demonstrate that he raised just \$8,291 in total contributions *and raised only one individual contribution from someone other than himself*. Fishman incorrectly argues that "there had not been any two polls indicating my support was less than 10 percent." Both the *Boston Globe* poll and the WBUR poll showed Fishman polling well below 10 percent. (Lappin Decl. ¶ 9.) Although the Station disputes Fishman's assertion that his campaign demonstrated sufficient interaction with the media to meet that single criterion, that dispute is ultimately irrelevant because Fishman admittedly failed to meet the other criteria.

¹⁶ 11 C.F.R. § 110.13(c).

¹⁷ 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995).

¹⁸ See *Buchanan v. FEC*, 112 F. Supp. 2d 58, 73-75 (D.D.C. 2000) (use of 15% threshold of support in independent poll objective and reasonable).

2. Fishman Provides No Evidence That The Debate Criteria Were Designed To Exclude Him.

Contrary to Fishman's suggestion, there is no evidence that criteria were specially designed to exclude him from participation. Fishman takes special exception to the \$50,000 contribution requirement, alleging that it "seems designed to explicitly exclude my campaign" because it was a criterion that his campaign had announced that it was "unwilling to meet." This allegation fails on its face for several reasons.

First, Fishman's own Complaint and campaign website belie his claim that he was "unwilling to meet" the \$50,000 contribution threshold. Fishman does not allege in his Complaint that he refused to accept individual campaign contributions—indeed, he actively solicited individual contributions on his webpage,¹⁹ albeit unsuccessfully. Fishman's allegation that he refused to accept "corporate" contributions is beside the point because corporate contributions are already illegal under federal election law.

Second, Fishman had an opportunity before and after the Debate criteria were announced to meet the required campaign contribution level. The Station informed Fishman of the campaign contribution threshold in advance of determining which candidates would be included in the Debate, and Fishman himself admits that he could have met the threshold "had he wished to do so" by contributing \$50,000. Although Fishman claims that it would be a "betrayal of his principles" to contribute his own money, he never alleges that it was a betrayal of his principles to raise the money from his supporters. Nor is it a betrayal of Fishman's principles to contribute his own money because he did, in fact, contribute \$8,000 to his campaign. In short, the fact that Fishman tried, but failed, to raise sufficient campaign funds speaks to the lack of support of Fishman's campaign, not the legitimacy of the criterion.²⁰

Finally, there is no merit to Fishman's implicit argument that the Station should not be permitted to choose objective criteria that may be inconsistent with a candidate's stated campaign philosophy, strategy, or use of resources. Such a premise is wholly inconsistent with the Commission's regulations that give staging organizations the discretion to select the objective criteria, would undermine a broadcaster's constitutionally protected journalistic discretion, and would effectively abolish a broadcast station's discretion to impose *any* criteria on *any* legally qualified candidate.

¹⁹ <http://www.fishmanforcongress.com/a-different-campaign/donate-and-volunteer> (last visited January 30, 2013) (copy attached).

²⁰ See *Forbes*, 523 U.S. at 682 ("[Forbes's] own objective lack of support, not his platform, was the criterion").

3. Fishman's Complaint Is Not Akin to *La Botz v. FEC*.

Mr. Fishman attempts to liken his Complaint to the case of *La Botz v. FEC*,²¹ but that effort also fails. In *La Botz*, the District Court remanded a complaint against the Ohio News Organization (OHNO) back to the Commission for further proceedings because the District Court found that (1) there was not sufficient evidence of OHNO using pre-established criteria for inclusion in the debate, and (2) there was evidence that OHNO used major party affiliation as the single criterion for inclusion in the debate.

Other than the fact that *La Botz* involved a debate staged by a media organization, Fishman's Complaint is not at all like *La Botz* for many different reasons, including the following:

- Unlike in *La Botz*, the Station relied on previously written objective criteria;
- Unlike in *La Botz*, Fishman received written advance notice of the pre-established criteria to be used to determine which candidates would be included in the debate;
- Unlike in *La Botz*, there is no evidence that WCVB may have used a prohibited criteria—such as major party affiliation—as the sole criteria for inclusion in the debate;
- Unlike in *La Botz*, Fishman had an opportunity to demonstrate compliance with the criteria before the candidates for inclusion were selected;
- Unlike in *La Botz*, WCVB has submitted two declarations based on the personal knowledge of the declarant; and
- Unlike in *La Botz*, WCVB reduced its objective criteria to writing.

For all of these reasons, the issues in *La Botz* are simply not present in this Complaint, and, as a result, the District Court's decision in that case is readily distinguishable.

Because WCVB's staging of the Sixth Congressional District debate (1) was a "news story" that was exempt from the definition of contribution or expenditure, and (2) complied with the exemption for candidate debates in 11 C.F.R. § 110.13, there is no reason to believe that Hearst Television, Inc. or WCVB violated the prohibition on contributions and expenditures in connection with a Federal election under 2 U.S.C. § 441b (or violated the Communications Act

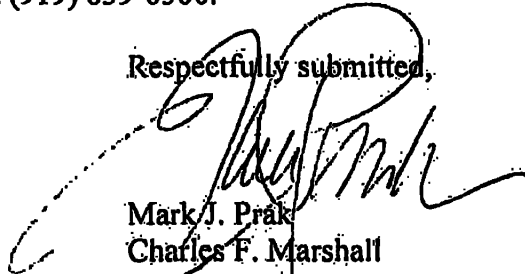
²¹ Civil Action No.: 11-1247, 2012 U.S. Dist. Lexis 125431, at *19-28 (D.D.C. Sept. 5, 2012).

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of 1934 or any other law in connection with the debate at issue). Accordingly, the Commission should take no action against Hearst Stations Inc. or WCVB.²²

If you have any questions or need any additional information, please do not hesitate to contact either of the undersigned at (919) 839-0300.

Respectfully submitted,



Mark J. Prāk
Charles F. Marshall
Counsel to Hearst Stations Inc.

Attachments

²² For these reasons, it is not necessary for the Commission to determine whether the costs of staging the debate constituted a lawful, independent "expenditure" in connection with a federal election under *Citizens United*. In the event the Commission determined that neither the media exemption nor the debate exemption was applicable here, WCVB respectfully reserves the opportunity to argue, among other things, that any such unintended "expenditure" was an independent expenditure permitted by *Citizens United* or was otherwise protected by the First Amendment.

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission

01/18/2013

Date

Jonathan C. Marshall
Respondent/Agent-Signature

Vice President and General Counsel

Title (Treasurer/Candidate/Owner)

RESPONDENT: Hearst Television, Inc.

(Committee Name, Company Name, or Individual Named in Notification Letter)

MAILING ADDRESS: 300 West 57th Street, 39th Floor, New York, NY 10019-3789
(Please Print)

TELEPHONE- HOME () _____

BUSINESS (212) 887-6817

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

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